IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MARQUIS DESHUNE CHARLESTON **APPELLANT**

V. **NO. 2014-KA-00828-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF OF THE APPELLANT

Hunter N. Aikens, MS Bar No. 102195
INDIGENT APPEALS DIVISION
OFFICE OF STATE PUBLIC DEFENDER
Post Office Box 3510
Jackson, Mississippi 39207-3510
Telephone: 601-576-4290
Fax: 601-576-4205
Email: haike@ospd.ms.gov

Counsel for Marquis Deshune Charleston

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MARQUIS DESHUNE CHARLESTON **APPELLANT**

V. **NO. 2014-KA-00828-COA**

STATE OF MISSISSIPPI **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Marquis Deshune Charleston, Appellant
3. Honorable Robert S. Smith, District Attorney
4. Honorable William A. Gowan, Circuit Court Judge

This the 21st day of April, 2015.

Respectfully Submitted,

INDIGENT APPEALS DIVISION
OFFICE OF STATE PUBLIC DEFENDER

BY: /s/ Hunter N. Aikens
Hunter N. Aikens
COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MARQUIS DESHUNE CHARLESTON **APPELLANT**

V. **NO. 2014-KA-00828-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUES

I. **THE TRIAL COURT ERRED IN SENTENCING CHARLESTON AS A HABITUAL OFFENDER.**

II. **PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT DEPRIVED CHARLESTON OF HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL.**

III. **CHARLESTON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.**

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Hinds County, Mississippi, First Judicial District, and a judgment of conviction for one count of attempted aggravated assault on a law enforcement officer, one count of felon in possession of a firearm and one count of fleeing a law enforcement officer entered against Marquis Deshune Charleston following a jury trial held on May

19-20, 2014, the Honorable William A. Gowan, Jr., Circuit Judge, presiding. (C.P. 42-44, R.E. 4-9). Charleston was represented at trial by M. Judith Barnette, Esq. and Jeffrey B. McGuire, Esq. The trial court adjudged Charleston a habitual offender under Mississippi Code Annotated Section 99-19-83 and sentenced him to three consecutive terms of life imprisonment. (C.P. 45-47, R.E. 10-12). Charleston's trial counsel filed no motion for judgement notwithstanding the verdict or for a new trial. The Office of the State Public Defender was later substituted as counsel for purposes of appeal. Charleston now appeals to this Honorable Court for relief.

STATEMENT OF THE FACTS

Marquis Charleston was indicted for one count of felony fleeing, one count of felon in possession of a firearm, and one count of attempted aggravated assault on a law enforcement officer. (C.P. 4-5). The three charges stemmed from an incident in which Officer Timothy Guise pursued a vehicle in his patrol car and then chased the vehicle's driver on foot. After opening statements, the parties entered an agreed stipulation that Charleston was a convicted felon on the day of the incident. (Tr. 65-66, Ex. 1). The following facts were adduced during parties' cases-in-chief at trail.

On the afternoon of April 19, 2013, patrol officer Timothy Guise of the Hinds County Sheriff's Department was working a roadblock at Meadow Lane and Sykes Road in Jackson, Mississippi. (Tr. 67-68). Guise noticed a small silver SUV (a Mercury "Mariner") turn around and drive away from the roadblock, and he got in his patrol car and pursued the Mariner with his lights and siren on. (Tr. 68-70).

According to Guise, the Mariner ran a traffic light and "avoided a car" at the intersection of Cooper Road and Meadow Lane, and turned left onto Cooper Road. (Tr. 70-71). Guise did not have radar to determine how fast the Mariner was traveling; he testified that the Mariner was traveling at "an unknown speed" that was "greater than safe." (Tr. 71). Guise continued to follow the Mariner

"from a safe distance"[1] and radioed for other officers to assist. (Tr. 71-72). Guise testified that he noticed two black males inside the vehicle not wearing seatbelts. (Tr. 70). Guise testified that the Mariner turned onto Rosemary, made a left at Woody Drive, ran a stop sign and avoided a collision at the intersection of Woody and Oak Forrest Drive, turned left onto Smallwood and ran a few stop signs before turning onto Ridgeland Drive, and then turned onto Branch Street and stopped. (Tr. 72-74).

When the Mariner stopped on Branch Street, the passenger exited the vehicle and put his hands in the air. (Tr. 74). Guise stopped his patrol car and began to step out; the Mariner began to drive away; and Guise pursued the Mariner a few more blocks until it stopped in front of a residence on Verbana Street. (Tr. 74). The driver then exited the Mariner and ran towards Rosewood Street, and Guise exited his patrol car and pursued the man on foot. (Tr. 74-76). Although Guise saw the passenger from a short distance when he exited the Mariner, he could not identify the passenger, and police never located or identified the passenger. (Tr. 83-84; 86).

Guise testified that when the driver exited the Mariner on Verbana Street, he chased the man over a residential fence and ordered him to stop. (Tr. 76). According to Guise, the man "brandished a small unknown handgun and fired one shot over his left shoulder" while running at full speed. (Tr. 76, 94). Guise then hit the ground, radioed for assistance and lost sight of the man. (Tr. 76-77; 91). Guise could not identify the firearm; he testified only that "I saw the barrel over the left shoulder and then heard the shot;" the man "just fired a shot in the direction in which I was pursuing him;" and "I just saw the hole of a barrel over the left shoulder and I heard the shot squeeze off and I hit the ground." (Tr. 77; 94-95).

---

[1] Guise described a "safe distance" as "anywhere between one vehicle's length to two vehicle's length behind the vehicle, whichever deemed safe enough to do so." (Tr. 85).

When Guise continued searching for the driver, he encountered off-duty officer Alfred Phillips, who informed him which direction the man ran. (Tr. 77-78). Phillips also grabbed his vest and briefly assisted Guise with the search. (Tr. 78). When other officers arrived, Guise returned the residence where the Marnier stopped; Guise testified that the house belonged to Charleston's mother, but another female, Kenya Mayberry, answered the door and identified herself as Charleston's girlfriend. (Tr. 78-79). Guise testified that Mayberry told police that she let Charleston use her Mariner and that Charleston was on his way to return it to her so that she could go to work. (Tr. 78-79).

At trial, Guise identified Charleston as the driver of the Mariner that allegedly fired a shot during the foot chase. (Tr. 84). Guise admitted that he was behind the Mariner and the man on foot during his pursuit(s), yet he claimed to see the driver's face for a slit second when he exited the car to run. (Tr. 85-86, 90). Guise claimed that he "did see a good description of the individual attempting to flee from me," but he admittedly did not identify the man as Charleston at the time. (Tr. 92). Guise testified that he later identified Charleston as the suspect after he talked to Mayberry, who "gave us a description of him which matched what I saw at that second of the individual" that ran from the Mariner. (Tr. 93). Guise testified that he was "an arm's reach" away from Charleston at one point and that "if I reached my arms out, I would have been able to grab him." (Tr. 89). When asked why he did not grab him, Guise claimed that he has trying to get on his radio to call other officers instead of tackling the man himself. (Tr. 89). Neither Guise nor other officers found any shell casings while later searching the area, and police never recovered a gun. (Tr. 91-92). And Guise testified that he did not search either Ms. Charleston's home or the Mariner. (Tr. 92).

Officer Trevis Banks responded to Guise's radio for assistance and arrived "after everything had happened." (Tr. 107). Banks testified that Guise gave him a cell phone that he (Guise) found

"out there on the scene." (Tr. 107; 113-14, Ex. 3). Banks logged the cell phone into evidence, and Jack Lily of the Attorney General's Office later received the phone and attempted to perform a data extraction but was unable to obtain any information because the phone was passcode protected. (Tr. 115, 147-48, Ex. S-3). Banks testified that police took Mayberry from Ms. Charleston's house to the police station, where he advised her of her rights and took a statement, in which Mayberry told him that she let Charleston use her Mariner to go to the store and to get gas. (Tr. 108-09). Banks then contacted U.S. Marshalls Guy Wyman and Pam Turner, advised them that Charleston was a suspect, and requested that they apprehend him. (Tr. 109).

Officer Alfred Phillips of the State Capitol Police recounted that he was off-duty working on a car in front of his house on the day in question when he heard a gunshot. (Tr. 129-30). Phillips looked up and "saw a black male jump the fence" running towards him. (Tr. 130). At trial, Phillips claimed that he saw the man drop what appeared to be a weapon, pick it up, and continue running. (Tr. 130). He admitted, however, that "it could be" a cell phone that he saw the man drop. (Tr. 136-37).

After seeing the man run, Phillips went inside his house, grabbed his vest and weapon, and walked back outside to find Officer Guise, who asked "Did you see a guy a running away?" (Tr. 130-31). Phillips told Guise that he did see someone running, and he helped Guise and other officers (who arrived momentarily) search the area. (Tr. 130-31). On the next street over, Phillips noticed the Mariner and asked Guise if that was the car the man was driving; Guise said it was; and Phillips said "That's the house right there." (Tr. 131-32). Police then knocked on the door and encountered Mayberry; she told police that Charleston was not in the house; the other officers "proceeded to go inside;" and Phillips left. (Tr. 132). Phillips identified Charleston in court as the man he saw

running. (Tr. 132). Phillips claimed that he recognized Charleston because he had seen him in the neighborhood once about five years ago. (Tr. 131, 137).

Kenya Mayberry testified that she dated Charleston off-and-on for a few months in 2013 and that she was at Charleston's mother's house on the day in question. (Tr. 119-21). Mayberry testified that she let Charleston use her Mariner to go to the store and to get some gas, but she did not know if anyone was with him and did not see him again that day after he left for the store in her Mariner. (Tr. 120-21). Mayberry recounted that she was watching television after Charleston left when she heard a knock on the door; she asked "who is it?" several times; and someone finally said "Hinds County Sheriff's Department. We looking for Marquis." (Tr. 121). Mayberry testified that she opened the door to find about seven officers with guns pointed at her; police pulled her outside and put her hands against the house; and police entered and searched the house even though she refused the officers request for consent. (Tr. 121-22, 124, 126-27). Police then took Mayberry to the police station and interrogated her. (Tr. 127).

U.S. Marchall Guy Wyman testified that Officer Banks sent him a warrant a few days prior to April 23, 2013, and he then began his search by interviewing "known associates and relatives of Mr. Charleston." (Tr. 151,157). Wyman testified that he received two phone calls on April 23, 2013, from a person who identified himself as Charleston, stated that he was in North Carolina and indicated that he wished to turn himself in. (Tr. 151-52). Charleston did not turn himself in; and Wyman later located Charleston at a Jackson apartment complex on May 10, 2013, after receiving information of his whereabouts. (Tr. 151-53). The apartment belonged to Aarimis Armstrong; she was not present when police entered to apprehend Charleston. (Tr. 153; 158). Wyman and other task force members knocked on the apartment door, but no one responded. (Tr. 153). According to Wyman, police then went to the apartment manager, showed her a warrant, and were provided a

key, which police used to enter the apartment. (Tr. 153). Police found Charleston hiding underneath an air-conditioning unit in the hallway, commanded him to come out and show his hands, and tased him. (Tr. 154-55).

Aarimis Armstrong testified that she was dating Charleston in April 2013,[2] and he stayed her apartment most nights since March. (Tr. 161, 163). She testified that she and Charleston spoke once about the incident, and "he just told me that he did not do it and that the police shot at him." (Tr. 162). Armstrong also testified that she never saw Charleston bring a gun into her house and did not know him to own a gun. (Tr. 164).

Charleston testified in his own defense at trial. He acknowledged that he mainly lived with Armstrong at the time and that he was at his mother's house on April19, 2013, visiting with her and his ex-girlfriend, Mayberry. (Tr. 179-80, 190). He also testified that Mayberry let him borrow her Mariner that day to get some gas and other things from the store. (Tr. 180). Charleston maintained, however, that he was not the driver of the Mariner who fled and allegedly fired a shot. (Tr. 194).

At trial, Charleston explained that before he went to the store, he picked up his friend, Ponjaur Johnson, and they went to some apartments on McDowell Road for a few minutes. (Tr. 180-81). Charleston testified that Johnson got ready to go the store and asked for the keys; Charleston gave Johnson the keys; Johnson got in the driver's seat; and Charleston hopped in the passenger seat. (Tr. 181). Charleston testified that they encountered the roadblock on the way to the store, and Johnson pulled into a driveway and turned around because they did not have a driver's license in the vehicle. (Tr. 181-82). Johnson then drove away from the roadblock, and they noticed a patrol car behind them momentarily. (Tr. 183). Charleston explained that he told Johnson "just let me out,"

[2] Armstrong knew of Charleston's other girlfriend, Mayberry, but she thought they had broken up before March. (Tr. 167-68).

Johnson stopped the car on Branch Street, and "I hopped out and I threw my hands up" and "he [Johnson] kept on going." (Tr. 184-85,195). Charleston testified that police did not chase him, and he did not have a gun or shoot at a police officer. (Tr. 188-89).

Charleston testified that on May 10, 2013, he was lying down at Armstrong's apartment when he heard a big knock on the door. (Tr. 190-92). Charleston explained that he looked out of the window and saw people "running around with guns; and he was scared, so he hid. (Tr. 192). He testified that police kicked the door in and tased him when they found him. (Tr. 192-93). He denied that he was person who called Wyman from North Carolina. (Tr. 207).

Charleston maintained that he was not the driver of the Mariner who fled and allegedly fired a shot. (Tr. 194). He testified that Johnson stopped the car on Branch Street because he told Johnson, "just let me out." (Tr. 195). Charleston maintained that he exited the passenger seat, "I put my hands up, but he [Johnson] kept going. When I seen he kept going, that's when I took off running." (Tr. 195). He testified that Guise never chased him, and he never saw or possessed a weapon. (Tr. 196). Charleston testified that the first time he ever saw Guise was after he was apprehended, and he had never seen Phillips. (Tr. 203-04, 213).

SUMMARY OF THE ARGUMENT

The trial court erred in sentencing Charleston as a habitual offender under Mississippi Code Annotated Section 99-19-83. Section 99-19-83 requires the State to prove beyond a reasonable doubt that the defendant served separate terms of one year or more on the prior convictions the State relies on to support his habitual status. In this case, the State's evidence was sufficient to prove that Charleston served one year or more on only one of the prior convictions the State relied on to support his habitual status. Thus, the State failed to prove beyond a reasonable doubt that Charleston was

habitual offender under Section 99-19-83, and Charleston requests this Court to vacate his habitual sentence and remand this case for re-sentencing as a non-habitual.

Additionally, prosecutorial misconduct during argument deprived Charleston of his fundamental right to a fair trial. Specifically, the prosecutor impermissibly stated facts not in evidence that were material to the jury's determination of Charleston's guilt or innocence, misstated the law on attempted aggravated assault, and personally vouched for the credibility of the State's witnesses. These instances of misconduct prejudiced Charleston's defense, deprived him of fair and objective evaluation of the evidence under correct principles of law by the jury, and violated his right to fair trial. Accordingly, Charleston requests this Court to reverse his convictions and sentence(s) and remand this case for a new trial.

Finally, a new trial is warranted because Charleston received ineffective assistance of counsel. Trial counsel was deficient in (1) failing to challenge the State's proof of Charleston's habitual offender status under Section 99-19-83, (2) failing to object to repeated instances of prosecutorial misconduct during closing argument, and (3) failing to request a limiting instruction to explain the limited permissible use of the stipulated fact that Charleston was prior convicted felon. These instances of deficient performance resulted in prejudice to Charleston's defense at trial and the disposition he received at sentencing. Accordingly, Charleston requests this Court to reverse his convictions and sentence(s) and remand this case for a new trial.

ARGUMENT

I. THE TRIAL COURT ERRED IN SENTENCING CHARLESTON AS A HABITUAL OFFENDER.

The trial court erred in sentencing Charleston as a habitual offender under Mississippi Code Annotated Section 99-19-83 because the State failed to prove beyond a reasonable doubt that

Charleston served separate terms of one year or more on the prior convictions the State relied on to support his habitual status. Trial counsel did not object or challenge the State's attempt to prove Charleston's habitual status. However, this Court may address this issue as plain error, as "[a]n accused has a fundamental right to be free of an illegal sentence." *Grayer v. State*, 120 So. 3d 964, 969 (¶16) (Miss. 2013) (citation omiited).

"[T]he State must prove a defendant's habitual-offender status beyond a reasonable doubt." *Russell v. State*, 79 So. 3d 529, 541 (¶38) (Miss. Ct. App. 2011) (citing *Gilbert v. State*, 48 So.3d 516, 524-25 (¶35) (Miss. 2010)). The State indicted Charleston as a habitual offender under Section 99-19-83, which, among other things, required the State to prove beyond a reasonable doubt that Charleston was "convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to *and served separate terms of one (1) year or more*. . . ." Miss. Code Ann. § 99-19-83 (emphasis added). "A principle deeply imbedded in our law requires us to construe criminal statutes strictly, resolving all doubts and ambiguities in favor of the accused." *Brown v. State*, 102 So. 3d 1087, 1089 (¶7) (Miss. 2012) (citations omitted). The sentencing hearing in this case is indicative of the warned-against "tendency to routinely allow the state to produce some documentation of prior offenses and for the trial court to perfunctorily find the defendant an habitual offender . . . ." *Seely v. State*, 451 So. 2d 213, 215 (Miss. 1984).

The indictment in this case alleged that Charleston was a habitual offender under Section 99-19-83 based on the following: (1) a conviction for sexual battery entered in case #09-0-025-01 on October 29, 2009, in the Hinds County Circuit Court, First District; (2) a conviction for receiving stolen goods entered in case #09-0-052 on February 11, 2010, in the Hinds County Circuit Court,

First District; and (3) a conviction for felon in possession of a firearm entered in case #09-0-534 on February 11, 2010, in the Hinds County Circuit Court, First District. (C.P. 5).

The State introduced a copy of Charleston's pen pack as an exhibit at the sentencing hearing. (Tr. 269, Ex. S-1). The pen pack contained orders of conviction and sentences indicating that Charleston was convicted of (1) sexual battery in case #09-0-025-01 on October 29, 2009, and received a sentence of ten years, with nine years and one month suspended, five years post-release supervision, and eleven months to serve; (2) receiving stolen goods in case #09-0-052 on February 11, 2010, and received a sentence of five years, with three years and ten months suspended, three years post-release supervision, and one year, two months and four days to serve; and (3) felon in possession of a firearm in case #09-0-534 on February 11, 2010, and received a sentence of five years, with three years and ten months suspended, three years post-release supervision, and one year, two months and four days to serve. (Ex. S-1). Each order granted Charleston credit for time served. (Ex. S-1, R.E. 14-16).

Charleston's MDOC inmate time sheet in the pen pack reflects that he was given credit for 327 days of time served for each of these sentences–measured from December 6, 2008 to October 29, 2009. (Ex. S-1, R.E. 17). Charleston's time sheet also reveals that he was released on probation on October 29, 2009, and the time sheet lists Charleston's "Total Time to Serve" as "TERM SERVED." (Ex. S-1, R.E. 17). Although the MDOC time sheets listed Charleston's credit for time served as "327" days, the prosecutor represented to the trial court during sentencing "his time served, according to MDOC was 397 days in pretrial detainment." (Tr. 270).

The pen pack contains an "Order of Revocation of Suspended Sentence" which was entered on August 28, 2013, following Charleston's arrest for the instant charges; this order revoked Charleston's suspended sentence only for the sexual battery conviction in case #09-0-025 and

ordered him to serve the nine years and one month that was originally suspended. (Ex. S-1, R.E. 18). This order did not revoke Charleston's suspended sentences for his receiving stolen property and felon in possession of a firearm convictions in case #09-0-052 and #09-0-534, presumably because Charleston's three-year terms of post-release supervision for these convictions had since expired, but his five-year term of post-release supervision for the sexual battery charge had not yet run.

In sum, the State's evidence was insufficient to prove beyond a reasonable doubt that Charleston actually served one year or more on two of the prior convictions relied on by the State as the basis for enchantment. The State's evidence showed that Charleston had served one year or more on his revoked sexual battery sentence in case #09-0-025; however, the evidence failed to establish beyond a reasonable doubt that he actually served one year or more on either the receiving stolen property or felon in possession of a firearm convictions in case #09-0-052 and #09-0-534. "Sentencing as an habitual offender under Miss. Code Ann., § 99-19-83 shall be vacated where the State at trial proves that the defendant has two felony convictions but fails to prove that the defendant actually served one year or more on each conviction." *Armstrong v. State*, 618 So. 2d 88, 89 (Miss. 1993) (citing *Ellis v. State*, 485 So. 2d 1062 (Miss. 1986)). Accordingly, Charleston requests this Court to vacate his habitual sentence and remand this for resentencing as a non-habitual.

II. PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT DEPRIVED CHARLESTON OF HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL.

During closing arguments, the prosecutor prejudiced Charleston's defense by impermissibly stating material facts not in evidence, vouching for the credibility of the State's witnesses, and misstating the law. "The standard of review which this Court must apply to lawyer misconduct during opening statements or closing arguments is 'whether the natural and probable effect of the

improper argument is to create unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created.'" *Flowers v. State*, 842 So. 2d 531, 553 (¶63) (Miss. 2003) (quoting *Sheppard v. State*, 777 So. 2d 659, 661 (Miss. 2001)).

Charleston acknowledges that trial counsel failed to object to the prosecutor's improper statements and that, "[i]n general, the failure to object to the prosecution's statements in closing argument constitutes a procedural bar."[3] *Ross v. State*, 954 So. 2d 968, 1001 (¶71) (Miss. 2007) (citing *Spicer v. State*, 921 So. 2d 292, 309 (Miss. 2006)). However, "'[w]here appellant cites numerous instances of improper and prejudicial conduct by the prosecutor, this Court has not been constrained from considering the merits of the alleged prejudice by the fact that objections were made and sustained, or that no objections were made.'" *Davis v. State*, 970 So. 2d 164, 170 (¶16) (Miss. Ct. App. 2006) (quoting *Smith v. State*, 457 So. 2d 327, 333-34 (Miss. 1984)). Charleston submits that instances of prosecutorial misconduct deprived him of a fair trial and requests this Court to recognize the error and remand this case for a new trial by either addressing the issue notwithstanding the lack of an objection or recognizing trial counsel's failure to object as ineffective assistance, as argued below.

The prosecutor impermissibly stated facts not in evidence

"In general, parties may comment upon any facts introduced into evidence, and may draw whatever deductions and inferences that seem proper from the facts." *Ross*, 954 So. 2d at 1002 (¶74) (citing *Bell v. State*, 725 So. 2d 836, 851 (Miss. 1998)). "Counsel 'cannot, however, state facts which are not in evidence, and which the court does not judicially know, in aid of his evidence.'"

[3] To this end, Charleston argues below that trial counsel's failure to object to the prosecutor's improper statements during closing argument constitutes ineffective assistance of counsel.

Flowers, 842 So. 2d at 554 (¶64) (quoting *Nelms & Blum Co. v. Fink*, 159 Miss. 372, 131 So. 817, 821 (1930)).

During closing argument, the prosecutor impermissibly stated facts not in evidence on two material points that prejudiced Charleston's defense. First, and most significantly, in an attempt to strengthen the weak identification evidence presented, the prosecutor represented that Phillips was able to identify Charleston because he "had seen [Charleston] *before many times* as being a person that lived in the community." (Tr. 238) (emphasis added). To the contrary, Phillips testified that he had seen Charleston only once before, about five years prior to the incident. (Tr. 131, 137). "Arguing statements of fact which are not in evidence or necessarily inerrable from facts in evidence is error when those statements are prejudicial." *Ross*, 954 So. 2d at 1002 (¶74) (citing *Blue v. State*, 674 So. 2d 1184, 1214 (Miss. 1996)).

The prosecutor's misstatement of fact–that Phillips had seen Charleston in the neighborhood "many times" before was not "necessarily inerrable" from Phillip's testimony that he had seen Charleston in the neighborhood once about five years ago. The prosecutor's misstatement of fact was prejudicial because Charleston's identity as the driver of the Mariner was a critical issue at trial, and the State's evidence identifying Charleston as the driver was weak. Guise admitted that he was behind the Mariner and the man on foot, and admittedly saw the driver's face for only a for a moment. (Tr. 85-86, 90). Guise claimed that he "did see a good description of the individual attempting to flee from me," but he admittedly did not identify Charleston as the driver until he later talked to Mayberry, who "gave us a description of him which matched what I saw at that second of the individual." (Tr. 92-93). By stating that Phillips was able to identify Charleston as the man he saw running, the State was allowed to impermissibly bolster its weak identification evidence to the detriment of Charleston's defense.

The prosecutor stated facts not in evidence a second time by telling the jury that cell phone was found "was found back by the house on Verbena, not on Rosemary Street." (Tr. 238). Guise did not testify that he found a phone, much less where he found it; Guise also testified that he did not search either Ms. Charleston's home or the Mariner. (Tr. 92). Banks testified only that, when he arrived, Guise gave him a phone that he recovered "out there on the scene." (Tr. 107; 113-14). Whether the phone was recovered on Rosemary Street (near the alleged shot) or on Verbena Street (at or near Ms. Charleston's house) was significant because the evidence was such that reasonable juror could have concluded that it was Guise who fired the shot that Phillips heard, and the object that Guise and Phillips allegedly saw the driver possess at the time was a cell phone, not a firearm. This question of fact pertained directly to two of the three charges in this case–felon in possession of firearm and attempted aggravated assault. And the State's evidence on this issue was not strong.

Guise testified: "I just saw the hole of a barrel over the left shoulder and I heard the shot squeeze off and I hit the ground." (Tr. 77; 94-95). Phillips admittedly only heard the shot; he did not see it. (Tr. 135-36). And Phillips further admitted that "it could be" a cell phone that he saw the man drop. (Tr. 136-37). Further, Mayberry testified that Charleston told her that the officer shot at him. Although Charleston denied telling Mayberry this, "[t]he jury may consider any of the evidence presented at trial. It is not limited to the testimony of the defendant." *Boyd v. State*, 557 So. 2d 1178, 1182 (Miss. 1989) (citation omitted). Guise's failure to mention the cell phone adds to this theory. In sum, the evidence was such that a reasonable juror could conclude that Guise fired at Charleston, Charleston dropped his cell phone, and Guise recovered it. To weaken this theory, the State attempted during closing argument to place the cell phone (in the jury's mind) at Ms. Charleston's house, away from the scene of the shot. This misstatement of the facts further prejudiced Charleston's defense and warrants a new trial.

The prosecutor impermissibly vouched for the credibility of its witnesses

"'[A] prosecutor is prohibited from stating his personal opinion as to the veracity of a witness[.]'" *Stokes v. State*, 141 So. 3d 421, 427 (¶23) (Miss. Ct. App. 2013) (quoting *Palmer v. State*, 878 So. 2d 1009, 1012 (¶9) (Miss. Ct. App. 2004)). "Typically, this type of prohibited statement occurs when a prosecutor attempts to vouch for or bolster a State witness by commenting in closing argument that the witness was telling the truth." *Id*., (citing *Foster v. State*, 639 So. 2d 1263, 1288 (Miss. 1994)). Additionally, "this Court has advised prosecutors not to use the pronoun 'I' when arguing to a jury, so that a jury would not infer that 'the prosecutor personally' feels a fact is true." *Holland v. State*, 705 So. 2d 307, 346 (¶162) (Miss. 1997) (quoting *Mack v. State*, 650 So. 2d 1289, 1321 (Miss. 1994), cert. denied, 516 U.S. 880, 116 S.Ct. 214, 133 L.Ed.2d 146 (1995)).

In this case, the prosecution impermissibly vouched for the credibility of its witnesses during closing argument by telling Charleston's jury that his version of the events "stands in the face of over half a dozen witnesses, *witnesses that have no reason to lie on him,* ***police officers that I can promise you*** *wouldn't risk their career to put this guy in jail and let the real shooter get away*." (Tr. 242) (emphasis added). This statement by the prosecutor was an impermissible attempt to personally vouch for its witnesses' credibility. This statement prejudiced Charleston's defense because the evidence in this case was essentially a "'he said, she said' circumstance," requiring the jury to decide whether it believed Charleston or Guise and Phillips. *See generally, Baskin v. State*, 145 So. 3d 601, 606 (¶30) (Miss. 2014). The prejudice from this statmeent compounded the prejudice from the prosecutor's statement of material facts not in evidence, and Charleston maintains that he was, thereby, denied a fair trial and a new is warranted.

The prosecutor impermissibly misstated the law

"To reverse on a misstatement of law, there must first be a misstatement of the law, and second, the misstatement must make the trial fundamentally unfair." *Holland v. State*, 705 So. 2d 307, 346 (¶157) (Miss. 1997) (citing *United States v. Goodapple*, 958 F.2d 1402, 1409 (7th Cir. 1992)).

In this case, the prosecutor misrepresented the law of attempted aggravated assault by telling Charleston's jury that "just pointing that firearm in his direction and pulling the trigger constitutes an attempt under attempted aggravated assault." (Tr. 239). Whether one fired a gun with the intent to scare or with the intent to cause bodily injury is a question for the jury. *See Harris v. State*, 970 So. 2d 151, 156 (¶¶19-20) (Miss. 2007); *see also*, *Brooks v. State*, 18 So. 3d 833, 841 (¶33) (Miss. 2009) ("to convict Brooks of aggravated assault based on an attempt to injure the officers with [] a deadly weapon, the State was required to prove that Brooks *intended* to injure them.") (emphasis in original). Thus, while pointing a gun and firing in the general direction of another *may* constitute attempted aggravated assault, that act also *may not* amount to attempted aggravated assault if the jury determines that the shot was fired without an intent to commit bodily injury and only to scare or back the other away. Whether Charleston fired the shot in actual attempt to cause bodily injury or not was a question of fact for the jury to determine. The prosecutor's misstatement of the law impermissibly gave the jury the impression that Charleston was guilty as a matter of law if it determined simply that Charleston fired a shot in Officer Guise's general direction. "[I]t is the duty of the trial judge to instruct the jury and not the district attorney." *Clemons v. State*, 320 So. 2d 368, 372 (Miss. 1975) (citing *Pearson v. State*, 254 Miss. 275, 179 So. 2d 792 (1965); Miss. Code Ann. § 99-17-35 (1972)). "[T]rial courts should never permit counsel in any case to make an argument calculated

to dispute the correctness of the instructions given as to the law by which a jury is to be guided in its deliberations." *Shaw v. State*, 188 Miss. 549, 195 So. 581, 581 (1940).

The prosecutor's misstatement of the law irreparably prejudiced Charleston's case as to Count I, attempted aggravated assault. In conjunction with the prosecutor's other instances of misconduct, Charleston was deprived of his fundamental right to fair trial, and this Court should consider this issue notwithstanding the lack of an objection and remand this case for a new trial.

III. CHARLESTON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

To establish a claim of ineffective assistance of counsel, the defendant must show that: "(1) that his defense counsel's performance was deficient, and (2) that his counsel's deficient performance was prejudicial to his defense." *Ravencraft v. State*, 989 So. 2d 437, 443 (¶31) (Miss. Ct. App. 2008) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984)). Trial counsel's performance is deficient if it "[f]ell below an objective standard of reasonableness." *Strickland,*466 U.S. at 688, 104 S. Ct. 2052. "More specific guidelines are not appropriate." *Id*. The defendant "faces a rebuttable presumption that his attorney's conduct is within the wide range of reasonable conduct and that his attorney's decisions were strategic." *Ravencraft*, at 443 (¶31) (citing *Edwards v. State*, 615 So. 2d 590, 596 (Miss. 1993)). The defendant may rebut this presumption by demonstrating that, but for his trial attorney's errors, there is "a reasonable probability" that a different result would have been reached at trial. *Stringer v. State,* 627 So. 2d 326, 329 (Miss. 1993). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.

"In determining whether counsel was ineffective, [this Court] review[s] counsel's performance as a whole in light of the totality of circumstances." *Coleman v. State*, 749 So. 2d 1003,

1010-11 (¶20) (Miss. 1999) (citation omitted). As demonstrated below, trial counsel's performance as a whole was deficient and prejudiced Charleston's defense to the extent that, but for counsel's errors, there is a reasonable probability that a different result would have been reached at Charleston's trial. Specifically, Charleston submits that trial counsel was ineffective in (1) failing to challenge the State's proof of Charleston's habitual offender status under Section 99-19-83, (2) failing to object to repeated instances of prosecutorial misconduct during closing argument, and (3) failing to request a limiting instruction to explain the limited permissible use of the stipulated fact that Charleston was prior convicted felon.

Failure to challenge the State's proof under Section 99-19-83

As argued above in Issue I, the State failed to prove that Charleston was a habitual offender under Section 99-19-83 because the State failed to present sufficient evidence to prove beyond a resonable doubt that Charleston actually served one year or more on the prior convictions alleged in the indictment and relied on by the State to establish his habitual status. At the sentencing hearing, the only words spoken by trial counsel related to Charleston's habitual status were "none that I noticed, Your Honor," when asked if there were "any concerns with the PIN pack, any argument or any deletions, any corrections?" (Tr. 268-69). "'When [trial counsel] fails to object to the habitual offender issue during the sentencing phase, [the defendant] is procedurally barred to do so for the first time on appeal.'" *Grayer*, 120 So. 3d at 968 (¶14) (quoting *Cummings v. State*, 465 So. 2d 993, 995 (Miss. 1985)).

This Court has previously determined that trial counsel was not ineffective where trial counsel's actions resulted in a reduced sentence under Section 99-19-81 rather that life without parole under Section 99-19-83. *See, e.g, Joiner v. State*, 61 So. 3d 171, 173 (¶9) (Miss. Ct. App. 2010); *Smith v. State*, 928 So. 2d 190, 191 (¶7) (Miss. Ct. App. 2005). A logical corollary of these

holdings is that trial counsel is ineffective for failing to avoid a life habitual sentence (much less three) under Section 99-19-83, where the State's evidence is insufficient to support it. Charleston submits that trial counsel's failure to challenge his habitual status was deficient performance, which prejudiced the outcome of his sentencing.

Failure to object to repeated prosecutorial misconduct during closing argument

As argued above in Issue II, trial counsel failed to object to repeated instances of prosecutorial misconduct during closing arguments, which prejudiced Charleston's defense by stating material facts not in evidence, misrepresenting the law of attempted aggravated assault, and personally vouching for the credibility of the State's witnesses. The failure to object to prosecutorial misconduct at trial renders the issue procedurally-barred on appeal . *See Jackson v. State*, 832 So. 2d 579, 581 (¶3) (Miss. Ct. App. 2002) ("Questions of prosecutorial misconduct will not be addressed where the defendant did not raise the question at trial.") (citation omitted).

Charleston submits that trial counsel's failure to object to the repeated instances prosecutorial misconduct during closing arguments was deficient performance that resulted in prejudice to the defense, in that, the prejudice caused by the prosecutor's impermissible statements (outlined above in Issue II) was permitted as a result of trial counsel's failure to object. Charleston submit that, but for counsel's error, there is a reasonable probability that a different result would have been reached at trial, and he is, therefore entitled to a new trial.

Failure to request a limiting instruction

Trial counsel was also ineffective in failing to request a limiting instruction to explain to the jury the limited permissible use of the stipulated fact that Charleston was a prior convicted felon. Prior to trial, Charleston stipulated that he was a prior convicted felon for the limited purposes of Count II, which charged that he was guilty of being a felon in possession of a firearm. (Tr. 65-66,

Ex. 1, R.E. 13). The stipulation read *in toto*: "The Defendant was a convicted felon on April 19, 2013, and is currently a convicted felon." *Id.*

"Where evidence of a prior conviction is a necessary element of the crime for which the defendant is on trial (i.e., possession of firearm by a convicted felon) . . . the trial court should accept a defendant's offer to stipulate *and grant a limiting instruction*." *Williams v. State*, 991 So. 2d 593, 605-06 (¶40) (Miss. 2008) (discussing *Rigby v. State*, 826 So. 2d 694 (Miss. 2002)) (emphasis added). Mississippi Rule of Evidence 105 provides that: "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." M.R.E. 105. As this Court had noted, trial counsel has duty/burned to request this limiting instruction. *Lindsey v. State*, 29 So. 3d 121, 123 (¶6) (Miss. Ct. App. 2010) (citing *Brown v. State*, 890 So. 2d 901 (Miss. 2004)).

As a result of trial counsel's failure to request a limiting instruction, Charleston's jury was not properly informed that it may consider the fact that Charleston was prior convicted felon for the sole purpose of establishing the prior convicted felon element of felon in possession of a firearm and not as evidence of Charleston's character or propensity evidence to suggest that, because he had violated the law previously, he was acting in conformity therewith on the day in question. Charleston submits that trial counsel's deficient performance in this instance prejudiced his defense by permitting the jury to consider his prior bad acts for impermissible purposes.

In sum, viewing trial counsel's performance as a whole, Charleston submits that trial counsel's numerous instances of deficient performance resulted in prejudice to his defense at trial and the outcome of his sentencing. Accordingly, Charleston respectfully requests this Honorable Court to reverse his convictions and sentence and remand this case for a new trial.

CONCLUSION

Based on the propositions briefed and the authorities cited above, together with any plain error noticed by the Court which has not been specifically raised, Charleston respectfully requests that this Honorable Court reverse the convictions and sentence(s) entered against him in the trial court and remand this case for a new trial or, alternatively, to vacate his habitual sentence under Section 99-19-83 and remand this case for re-sentencing.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: /s/ Hunter N. Aikens
Hunter N Aikens, MSB# 102195
COUNSEL FOR APPELLANT

OFFICE OF STATE PUBLIC DEFENDER
INDIGENT APPEALS DIVISION
Post Office Box 3510
Jackson, Mississippi 39207-3510
Telephone: 601-576-4200
Fax: 601-576-4205
email: haike@ospd.ms.gov]

CERTIFICATE OF SERVICE

I, Hunter N. Aikens, Counsel for Marquis Deshune Charleston, do hereby certify that on this day I electronically filed the forgoing **BRIEF OF THE APPELLANT** with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

Honorable John R. Henry, Jr.
Attorney General Office
Post Office Box 220
Jackson, MS 39205-0220

Further, I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above to the following non- MEC participants:

Honorable William A. Gowan
Circuit Court Judge
Post Office Box 22711
Jackson, MS 39225

Honorable Robert S. Smith
District Attorney, District 7
Post Office Box 22747
Jackson, MS 39225

This the 21st day of April, 2015.

/s/ Hunter N. Aikens
Hunter N. Aikens
COUNSEL FOR APPELLANT

Hunter N. Aikens, MS Bar No. 102195
INDIGENT APPEALS DIVISION
OFFICE OF STATE PUBLIC DEFENDER
Post Office Box 3510
Jackson, Mississippi 39207-3510
Telephone: 601-576-4290
Fax: 601-576-4205
Email: haike@ospd.ms.gov